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IN THE

Supreme Court of the United States

October Term 1973

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No. 73-635

*****

DAN FOUST,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

*****

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NORTH CAROLINA

*****

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NORTH CAROLINA

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TO: The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Dan Foust, petitions this Court for writ of certiorari to the Court of Appeals of the State of North Carolina, and, to this end, the petitioner respectfully shows the Court:

REFERENCE TO OPINIONS BELOW

Copy of the opinions in the courts below are appended and the references to the official and unofficial reports thereof are:

State v. Foust, 18 N.C. App. 133, 196 S.E. 2d 374 (1973) and State v. Foust, 283 N.C. 667, 197 S.E. 2d 876 (1973).

JURISDICTION

The date of the Judgment of the Court of Appeals, sought to be reviewed, was May 9, 1973, and the date of its certification (entry) was May 21, 1973.

The date of the judgment of the Supreme Court of North Carolina, dismissing petitioner's appeal and denying his petition to that court for writ of certiorari, was July 12, 1973, and the date of its entry was July 16, 1973.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The questions presented are:

1. Whether petitioners rights under Section 1 of the Fourteenth Amendment of the Constitution of the United States have been denied him by the State of North Carolina by failure to comply with statutory provisions requiring him to be brought before a magistrate following his arrest without warrant, by the issuance of warrant in violation of said statutory provisions, and by his trial and conviction on said warrant, notwithstanding his motion to quash, which was timely made and properly insisted upon at all stages of the proceedings against him.

2. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United States will be denied him by the United States if this Court should not afford petitioner relief from the conviction and sentence unlawfully imposed upon him in violation of his constitutional rights by the State of North Carolina.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Involved are:

Amendment V of the Constitution of the United States (U.S.C.A. Const., 1st Vol., p. 46):

"No person shall be . . . . deprived of life, liberty, or property, without due process of law . . ."

Section 1, Amendment XIV of the Constitution of the United States (U.S.C.A. Const., 1st vol., p. 48):

" . . nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 19, of the Constitution of the State of North Carolina (General Statutes of North Carolina, Vol. 4A, p. 12 - Michie 1970):

"**Law of the land; equal protection of the laws.** No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

Article I, Sction 21, of the Constitution of the State of North Carolina (General Statutes of North Carolina, Vol. 4A, p. 34 - Michie 1970):

"**Inquiry into restraints on liberty.** Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended."

Section 15-46 of the General Statutes of North Carolina (Vol. 1C, p.33 - Michie 1965):

"'**Procedure on arrest without warrant.** - Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

STATEMENT OF THE CASE

This is a criminal action in which the petitioner was arrested without warrant in the City of Graham, the county seat of Alamance County, North Carolina. While being arrested by Graham Policeman Smith, petitioner was assulted and beaten by Graham Policeman Hughes. Petitioner was taken to the Alamance County Jail in a beaten and bloody condition; but was not taken before the magistrate on duty at the jail, notwithstanding the provisions of N.C. General Statutes § 15-46, which requires that "every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law." Instead, Policeman Hughes, unlawfully and in violation of that statute, obtained from the magistrate, who knew that the petitioner was being held under arrest at the jail, warrants charging petitioner with illegal possession of tax paid whiskey, public drunkenness, and resisting, obstructing and delaying a public officer in the performance of his duty. Shortly thereafter, petitioner's wife applied at the jail for his release to get him to a doctor, but was informed that she could get the petitioner out in four to six hours.

Before plea in the Alamance District Court, petitioner moved to quash the warrants, which motion was denied. In that court, petitioner was found not guilty of illegal possession, but guilty of public drunkenness and resisting arrest. On appeal to Superior Court, petitioner again, before plea, moved to quash, which motion was again denied and the case ordered to trial. The case was tried de novo before a

jury and petitioner was found guilty of public drunkenness, and "guilty of resisting, obstruction OR delaying a public officer in the performance of his duty". [Emphasis added.] Petitioner moved to arrest judgment in both cases. These motions were denied, but on reconsideration the trial judge granted the motion in the public drunkenness case and entered an order dismissing that case and releasing the petitioner from custody on account of that charge.

Petitioner then appealed to the Court of Appeals of North Carolina, assigning errors. That court found no error. In their decision, the Court of Appeals discussed specifically only two of petitioners assignments of error and dismissed all the others en masse with the statement: "We have carefully considered the numerous other assignments of error brought forward and argued in defendant's brief but finding them without merit, they are all overruled." Of the two assignments of error noticed by the Court of Appeals, one was the denial of petitioner's motion to quash, and this the Court of Appeals dismissed with the statement that N.C. General Statutes §§ 15-46 and 15-47 "do not prescribe mandatory procedures affecting the validity of a trial".

Petitioner then appealed to the Supreme Court of North Carolina and at the same time petitioned that court for writ of certiorari to the Court of Appeals for review of assignments not reviewable by appeal. Petitioner's appeal was dismissed, and petition for certiorari was denied, by the Supreme Court of North Carolina.

WHEN AND HOW FEDERAL QUESTIONS RAISED

As already indicated, the validity of the warrant was

challenged as the first step in petitioner's defense. No record is made of the trial of criminal cases in District Court, but in Superior Court it was admitted by the State that motion to quash had been made in District Court before plea. (R.p. 8)

On the motion to quash in Superior Court, the magistrate testified, and the Court found, that your petitioner was arrested without warrant and was not taken before the magistrate. The Court held, however, that failure to have the defendant before the magistrate "was not a defect as to require quashing the warrant", and ordered the case to trial. (R.pp. 9-11) This was defendant's exception #1. When the case actually came on for trial, the motion to quash was renewed before plea and again denied. This was defendant's exception #2. (R.p. 11) These two exceptions were made the subject of defendant's assignment of error #1 (R.p. 69) as follows: "The defendant appellant assigns as error the denial of defendant's motions to quash the warrants for that the warrants were not issued in accordance with the provisions of GS § 15-46, and the warrants were issued in violation of the requirements of due process."

It should be noted at this point that the motion to quash was procedurally correct under North Carolina law. **State v. Green,** 251 NC 40, 110 SE 2d 609 (1959). It should also be noted that appellate review of the adverse ruling on the motion could not be had until after conviction. NC GS § 15-180; **State v. Baker,** 240 NC 140, 81 SE 2d 199 (1954).

Due process and equal protection of the laws were also discussed in your petitioner's brief to the Court of Appeals (pp. 11-17).

At page 3 of your petitioner's petition to the Supreme Court of North Carolina for certiorari to the Court of Appeals, the North Carolina Court was asked to review the legal effect of the actions following the arrest of your

petitioner which deprived him of the rights under GS 15-46 which are constitutionally guaranteed to every person who is arrested without warrant. And at page 2 of his notice of appeal to the Supreme Court of North Carolina, your petitioner urged "(4) That, if this Court gives judicial finality to this denial of appellant's rights under the Constitution of North Carolina and GS Sec. 15-46, such denial will be in contravention of the provisions of the Fifth Amendment, and of Section 1 of the Fourteenth Amendment, to the Constitution of the United States. As appears from the appended judgment of the North Carolina Court the petition for certiorari was denied and the appeal was dismissed for lack of substantial constitutional question.

And see **Raley v. Ohio,** 360 US 423, 3 L ed 1344, 79 S Ct 1257 (1959); **New York ex rel. Bryant v. Zimmerman,** 278 US 63, 73 L ed 184, 49 S Ct 61, 62 ALR 785 (1928).

REASON FOR ALLOWANCE OF WRIT

The most basic concept of our system of government is that no branch of government may do that which it is not lawfully empowered to do. In the judicial branch, this is generally encompassed in the word "jurisdiction", and jurisdiction is a basic, if not the most basic, concept of due process of law.

It is established by many decisions of this Court that jurisdiction must exist and that, before jurisdiction attaches in a particular case, jurisdiction must be properly invoked according to the regular course of judicial procedure. **Muskrat v. United States,** 1911, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246; **Ex parte Bain,** 121 US 1, 7 S.Ct. 781, 30 L.Ed.

849. See also **United States v. Gallagher,** 3 Cir. 1950, 183 F2d 342, cert. denied 1951, 340 U.S. 913, 71 S.Ct. 283, 95 L.Ed. 659. The same rule applies in North Carolina. **State v. Morgan,** 226 NC 414, 38 S.E. 2d 166 (1946); **State v. Rawls,** 203 N.C. 436, 166 S.E. 332 (1932); **State v. Tucker,** 238 N.C. 206, 77 S.E. 632 (1953).

In North Carolina, the regular course of judicial procedure for prosecution of those arrested without warrant is prescribed in GS § 15-46. The mandatory nature of that section is apparent from its language, which, it is submitted, prescribes a procedure which is both a condition subsequent to be fulfilled for the validity of the arrest, and a condition precedent, to be fulfilled for the validity of any warrant issued. See **United States v. Coplon,** Cir 2, 1950, 185 F. 2d 629, 28 A.L.R. 2d 1041, cert. denied 342 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688. The mandatory nature of the statute is butressed by the constitutional provision contained in Section 21 of Article I of the State Constitution, which provides that there shall be no denial or delay of the right of every person restrained of his liberty to a remedy to inquire into the lawfulness of the restraint and to remove it if unlawful. This casts the statutory implementation of the constitutional provision, by the requirement of GS § 15-46, and the rights of a person arrested without warrant, not merely as statutory, but also as constitutional, due process.

As your petitioner did nothing which could be construed as a waiver of these rights, but on the contrary has insisted upon them at every stage of the proceedings against him, it appears that his conviction has been without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and that he has been denied the equal protection of the laws by the State of North Carolina through the decision of the Court of Appeals of North Carolina, upheld by the judgment of the Supreme Court of North Carolina, all in a way probably not in accord with the applicable decisions of this Court.

In **Coplon v. United States,** U.S.C.A., D.C. 1951, 89 U.S.App.D.C. 103, 191 F.2d 749, cert. denied 1952, 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690, is the following:

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

And:

> "The right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and reqires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial."

and in **Glasser v. United States,** 1942, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680, it was held:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Your petitioner was not denied the right to counsel, but surely jurisdiction is not less fundamental and absolute than the right to counsel. The question of the error and invalidity of petitioner's conviction is substantial as to him, and as to the United States as a violation of the integrity of the basic and absolute concept of jurisdiction.

This Court's denial of relief to the petitioner would be for the United States to deprive petitioner of his liberty

without due process of law in violation of the Fifth amendment of the Constitution of the United States.

CONCLUSION

For the foregoing reason, writ of certiorari should be granted as prayed herein.

Respectfully submitted,

6 October 1973

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JUDGMENT SOUGHT TO BE REVIEWED

No. 7315SC289 FIFTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1973

STATE OF NORTH CAROLINA

v. From Alamance

DAN FOUST

Appeal by defendant from Cooper, Judge, 16 October 1972 Criminal Session, Alamance Superior Court.

In one warrant defendant was charged with (1) public drunkenness and (2) illegal possession of tax-paid whiskey. In a second warrant he was charged with resisting arrest. The alleged offenses occurred on 5 September 1971. In district court defendant was acquitted of the illegal possession of whiskey charge but was found guilty of the other charges. From judgement imposed, he appealed to superior court.

In superior court the public drunkenness charge and the resisting arrest charge were consolidated for trial and a jury returned a verdict of guilty as to both charges. Thereafter, on motion of defendant, judgment was arrested as to the public drunkenness charge and it was dismissed "by reason of chronic alcoholism." From judgment imposing suspended sentence in the resisting arrest case, defendant appealed.

Attorney General Robert Morgan by C. Diederich Heidgerd, Associate Attorney, for the State.

Walter G. Green for defendant appellant.

BRITT, JUDGE. In his first assignment of error, defendant contends the court erred in not allowing his motion to quash the warrant charging him with resisting arrest for the reason that he was arrested without a warrant and was not taken before a magistrate as provided by G.S. 15-46. The contention is without merit. In State v. McCloud, 276 N.C. 518, 173 S.E. 2d 753 (1970), our Supreme Court held that G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial. See also State v. Broome, 269 N.C. 661, 153 S.E. 2d 384 (1967) and State v. Able, 13 N.C. App. 365, 185 S.E. 2d 422 (1971). The assignment of error is overruled.

Defendant assigns as error the failure of the court to grant his motions for nonsuit. The evidence, viewed in the light most favorable to the State, tended to show: Around 5:15 p.m. on Sunday, 5 September 1971, Graham police officers observed an automobile being driven in an unusual manner on a public street of the City of Graham. They stopped the car and the operator, who appeared to be drunk, was arrested. While the operator was being placed under arrest, defendant, a passenger in the car, got out of the car with the smell of alcohol on his breath, cursed at police, staggered, "foamed at the mouth" and spoke with a "thick tongue." Defendant was told that he was under arrest for public drunkenness after which he continued to curse and refused to get into the police car. The initial arresting officer had trouble controlling the defendant and another policeman assisted. Defendant pushed the assisting policeman and spat in his face.

A peace officer may arrest without a warrant when the person to be arrested has committed a misdemeanor in the presence of the officer or when the peace officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. G.S. 15-41(1). State v. Summrell, 282 N.C. 157, 192 S.E. 2d 569 (1972); State v. Fenner, 263 N.C. 694, 140 S.E. 2d 349 (1965). Under the evidence in the instant case, the questions (1) whether defendant committed a misdemeanor in the presence of the officer, or the officer had reasonable grounds to believe he did, and (2) whether defendant resisted arrest were for the jury. The assignment of error is overruled.

We have carefully considered the numerous other assignments of error brought forward and argued in defendant's brief but finding them without merit, they all are overruled.

No error.

Judges BROCK and PARKER concur.

Filed May 9, 1973.
Certified May 21, 1973, to Clerk of
Superior Court of Alamance County.

JUDGMENT OF NORTH CAROLINA SUPREME COURT

DISMISSING APPEAL AND DENYING CERTIORARI

No. 97PC
(also Number 12
Fall Term 1973)

FIFTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1973

STATE OF NORTH CAROLINA	)	Judgment Dismissing Appeal and Denying Petition for Writ of Certiorari (7315SC289)
v	)	
DAN FOUST	)	

This matter came on to be considered upon petition for writ of certiorari to N. C. Court of Appeals to review its decision on the 12th day of July 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the petition for writ of certiorari should be denied and that the appeal be dismissed for lack of substantial constitutional question:

NOW, THEREFORE, it is ordered accordingly that the petition be denied and that the appeal be dismissed as aforesaid and certified to the Clerk of the North Carolina Court of Appeals; whereupon, it is considered and adjudged

that the defendant, Dan Foust and sureties to the appeal bond, Floyd C. Caudle and Willie Mae Caudle, do pay the costs incurred, to wit: the sum of Eighteen ($18.00) Dollars, and that execution issue therefor.

Witness my hand and official seal, this the 16th day of July, 1973.

Adrian J. Newton
Clerk of the Supreme Court

(SEAL)

CC: Mr. Walter C. Green,
Attorney at Law
Mr. C. Diederich Heidgerd
Associate Attorney
Mr. Herbert F. Pierce,
Solicitor